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Supreme Court of the United States

October Term, 1948

No. 791

CONTINENTAL CASUALTY COMPANY, a corporation,

Petitioner,

vs.

UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,

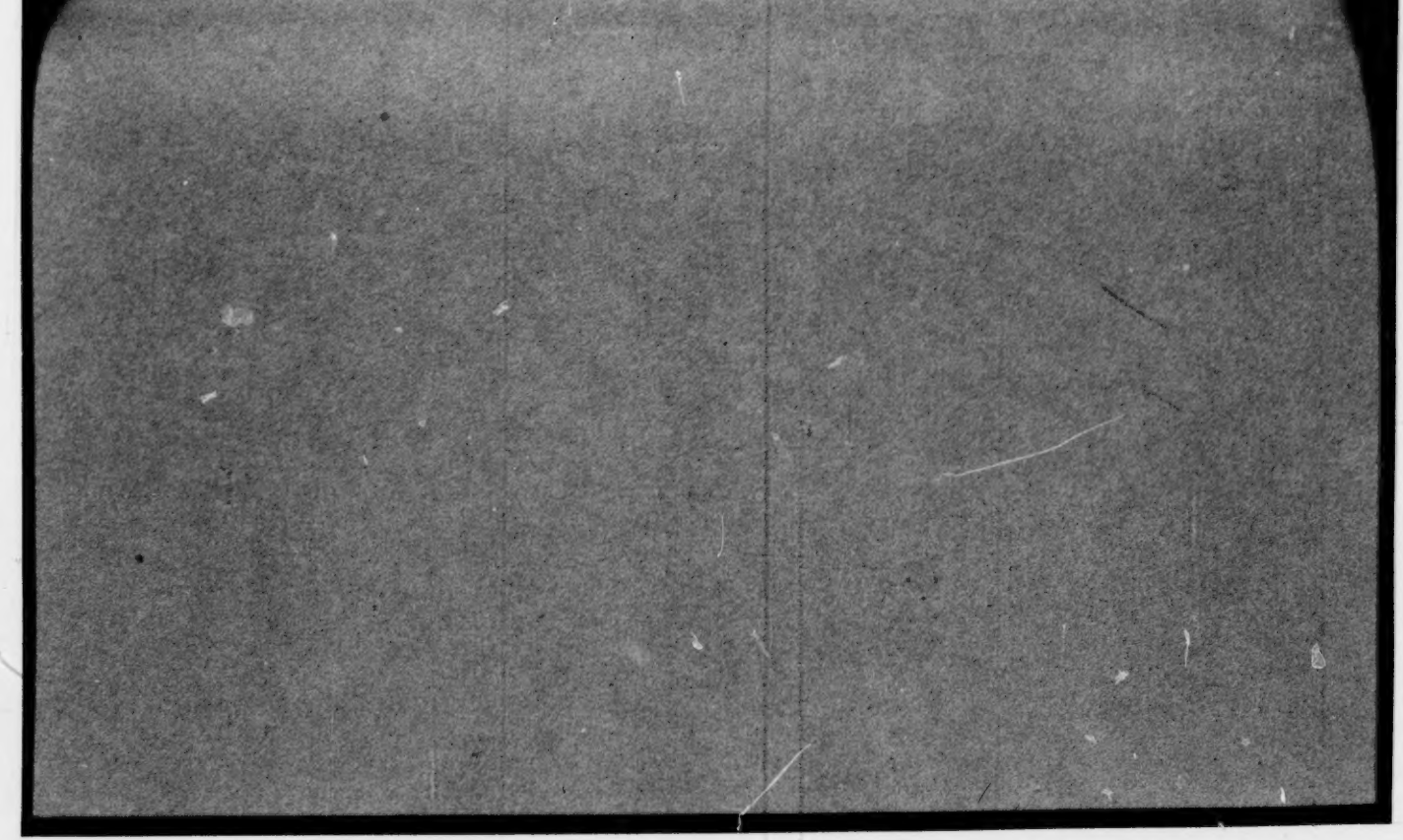
Respondent,

SAM MACRI, DON MACRI, and JOE MACRI, individuals and co-partners; A. J. GOERIG and CLYDE PHILP, individuals and co-partners,

Defendants.

PETITION OF CONTINENTAL CASUALTY COMPANY FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

EUGENE D. IVY
ELWOOD HUTCHESON
GEORGE W. WILKINS
Attorneys for Petitioner,
Continental Casualty Co.
Miller Building
Yakima, Washington



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GEORGE W. WILKINS
Attorneys for Petitioner, Continental Casualty Co.
Miller Building
Yakima, Washington

SUBJECT INDEX

Petition for writ of certiorari 1

Statement of the case 2

Jurisdictional statement 11

Questions presented 12

Reasons for allowance of writ 13

Prayer for writ 15

Brief in support of petition for writ of certiorari 16

Opinions of the courts below 16

Jurisdiction 16

Statement of the case 18

Specification of errors 19

Argument 22

Summary of argument 22

1. Surety on payment bond under the Miller Act is not liable for damages or increased costs sustained by subcontractor by reason of breach of contract by principal contractor 24

2. In any event surety not liable for any items except labor expenses 35

3. The action being based upon a federal statute, the Miller Act, the federal rather than state law governs 36

4. Respondent having continued and completed full performance of his subcontract cannot recover on implied or quasi-contract in excess of the agreed contract price 37

5. Insufficient proof of damages 41

6. Additional attorneys' fees 42

Conclusion 42

Appendix — Quotations from cases 45

TABLE OF CASES

Page

American Can Co. v. Ladoga Canning Co., (CCA 7) 44 F. 2d 763, cert. denied, 282 U. S. 899 42

American Surety Co. v. Wheeling, (CCA 4) 114 F. 2d 237 34

Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America, 182 Wash. 133, 45 P. 2d 41 42

Bailey v. Furleigh, 121 Wash. 207, 208 Pac. 1091 40

Bay Ridge Operating Co. v. Aaron, 334 U. S. 446, 92 L. Ed. 1502 18

Black Masonry & Contracting Co. v. National Surety Co., 61 Wash. 471, 112 Pac. 517 37

Briggs v. Pennsylvania R. Co., 334 U. S. 304, 92 L. Ed. 1403 18

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 89 L. Ed. 1296 18

Chase v. Smith, 35 Wash. 631, 77 Pac. 1069 40

City & County of San Francisco v. Transbay Co., (CCA 9) 134 F. 2d 468, cert. denied, 320 U. S. 749, 88 L. Ed. 445 39

Clearfield Trust Co. v. U. S., 318 U. S. 353, 87 L. Ed. 838 36

Commissioner v. Tower, 327 U. S. 280, 91 L. Ed. 670 37

Continental Cas. Co. v. U. S., 173 F. 2d 5 16

Continental Co. v. Boyd, 140 F. 2d 115 35

Cuno Engineering Corp. v. Automatic Devises Corp., 314 U. S. 84, 86 L. Ed. 58 18

Davis v. Parrington, (CCA) 281 Fed. 10 42

Davis v. Thurston County, 119 Wash. 414, 205 Pac. 840 40

Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762 ..... 14, 40

Dickerson v. Emmerson, 154 Ore. 558, 68 P. 2d 439 41

Page

D'Oench v. Federal Deposit Ins. Corp., 314 U. S. 447, 86 L. Ed. 956 36

Dyer v. Pederson, 112 Wash. 390, 192 Pac. 1002, (197 Pac. 662) 40

Edward Thompson Co. v. Decker, 200 Ill. App. 179 41

Farnsworth Co. v. Electrical Supply Co., (CCA 5) 112 F. 2d 150 37

Farnum v. Kennebec Water Dist., (CCA 1) 170 Fed. 173 ..... 14, 40

Forsyth v. Hammond, 166 U. S. 506, 41 L. Ed. 1095 18

Francis v. Southern Pac. Co., 333 U. S. 445, 92 L. Ed. 798 ..... 18, 37

Friestedt Co. v. U. S. Fireproofing Co., (CCA 10) 125 F. 2d 1010 ..... 13, 34

Goss v. Northern Pac. Hospital Assn., 50 Wash. 236, 96 Pac. 1078 41

Hamilton v. Whittaker, 29 Wn. 2d 173, 186 P. 2d 609 37

Hansen v. Covell, 218 Cal. 622, 24 P. 2d 772, 89 A.L.R. 670 41

Hawkins v. U. S., 96 U. S. (6 Otto) 698, 24 L. Ed. 607 38

Haydenville Mining Co. v. Art Institute, 36 Fed. 484 41

Hennessey v. Bacon, 137 U. S. 78, 34 L. Ed. 605 39

Hickman v. Taylor, 329 U. S. 495, 91 L. Ed. 451 18

Hoyle v. Stellwagen, 28 Ind. App. 681, 63 N. E. 780 40

Hubbard v. N. Y. Inv. Co., 119 U. S. 696, 30 L. Ed. 548 38

Jack v. Armour & Co., (CCA 8) 291 Fed. 741 42

Keeler v. Clifford, 165 Ill. 544, 46 N. E. 248 41

Keogh v. Chicago & N. R. Co., 260 U. S. 156, 67 L. Ed. 183 42

Keyhoe v. Rutherford, 56 N. J. L. 23, 27 Atl. 912 40

Page

Klebe v. U. S., 263 U. S. 188, 68 L. Ed. 244.....14, 38

Lane & Bowler Corp. v. Western Well Works, 261 U. S. 387, 67 L. Ed. 712..... 18

Liebman v. U. S., (CCA 9) 153 F. 2d 350..... 37

Lidral-Wiley, Inc. v. U. S. Fidelity & Guaranty Co., 179 Wash. 631, 38 P. 2d 346..... 37

Little v. Brown, 36 Ariz. 194, 283 Pac. 924..... 41

Locker v. Am. Tobacco Co., (CCA 2) 218 Fed. 447..... 42

Louisville & N. R. Co. v. Dickerson, (CCA 6) 191 Fed. 705 42

McEvoy v. U. S., 322 U. S. 102, 88 L. Ed. 1163.....14, 18, 34

Montana Mining Co. v. St. Louis Mining Co., 204 U. S. 204, 51 L. Ed. 444..... 18

Muncie Gear Works v. Outboard Marine & Mfg. Co., 315 U. S. 759, 86 L. Ed. 1171..... 18

Noyes v. Pugin, 2 Wash. 657, 27 Pac. 548..... 40

Oakley v. Duluth Superior Dredging Co., 223 Mich. 478, 194 N. W. 123..... 40

Ogden v. Ruhm, (CCA 2) 7 F. 2d 1007, cert. denied, 269 U. S. 571, 70 L. Ed 417..... 38

Quigg Construc. Co. v. Chelan County, 108 Wash. 314, 184 Pac. 331.....38, 39, 40, 42

Rachow v. Philbrick, 148 Wash. 214, 268 Pac. 876..... 40

Richard v. Clark, 88 N. Y. S. 242..... 41

Rigopoulous v. Kervan, (CCA 2) 140 F. 2d 506..... 42

Rodgers v. U. S., 3323 U. S. 381, 92 L. Ed. 3..... 18

Royal Indemnity Co. v. U. S., 313 U. S. 289, 85 L. Ed. 1361 36

Russell v. Bothwell, 57 Utah 362, 194 Pac. 1109..... 41

Shapiro v. U. S., 335 U. S. 1, 92 L. Ed. 1787..... 18

Page

Sola Electric Co. v. Jefferson Electric Co, 317 U. S. 173, 87 L. Ed. 165 36

Terry v. U. S. Fidelity & Guaranty Co., 196 Wash. 206, 82 P. 2d 532, 119 A.L.R. 1276 37

Theobold-Jansen Electric Co. v. Meyer, (CCA 10) 77 F. 2d 27 35

U. S. v. Clearfield Trust Co., (CCA 3) 130 F. 2d 93 36

U. S. v. Conti, (CCA 1) 119 F. 2d 652 37

U. S. v. Davidson, 71 F. Supp. 401 35

U. S. v. Great American Indemnity Co., 30 F. Supp. 613 35

U. S. v. John A. Johnson & Sons, 65 F. Supp. 514, 526-532 ..... 14, 34

U. S. v. Maryland Casualty Co., (CCA 5) 147 F. 2d 423 13, 34

U. S. v. Maryland Casualty Co., 54 F. Supp. 290 ..... 14, 34

U. S. v. Massachusetts Bonding & Ins. Co., (CCA 6) 18 F. 2d 203 ..... 14, 34

U. S. v. Rego Bldg. Corp., (CCA 2) 87 F. 2d 1021 35

U. S. v. Seaboard Surety Co., 26 F. Supp. 681 34

U. S. v. Standard Casualty Co., 32 F. Supp. 838 35

U. S. v. Starr, (CCA 4) 20 F. 2d 803 37

U. S. v. Wyckoff Pipe & Creosoting Co., 271 U. S. 263, 70 L. Ed. 938 ..... 14, 38

U. S. v. Zazove, 334 U. S. 602, 92 L. Ed. 1601 18

U. S. Potash Co. v. McNutt, (CCA 10) 70 F. 2d 126 ..... 14, 38, 40

Wells Bros. Co. v. U. S., 254 U. S. 83, 65 L. Ed. 148 41

Wilson v. Reynolds, 213 Ind. 436, 13 N. E. 2d 218 41

Wolfe v. Prairie Oil & Gas Co., (CCA 10) 83 F. 2d 434 ..... 14, 38, 40

Page

12 Am. Jur. 968, sec. 390 40

7 C. J. S. 136, sec. 36 41

17 C. J. S. 321, sec. 5, and 325, sec. 6 38

Miller Act, USCA, title 40, sec. 270a, 270b 2, 17, 24

Restatement of Contracts, sec. 317 (2) and sec. 350, and Comments a and b, and Illustration 1 39

U. S. Code, title 28, sec. 1254, par. (1) 11

U. S. Code, title 28, sec. 2101, par. (c) and (e) 11, 17

U. S. Sup. Ct., Rule 38, par. 5 (b) 12, 13, 17, 18

Williston on Contracts (Rev. Ed.), vol. 5, p. 3676, sec. 1290 39

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Defendants.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Continental Casualty Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on February 11, 1949, (R. 2274) petition for rehearing denied April 5, 1949, (R. 2275) affirming the judgment of the United States District Court for the Eastern District of Washington, Southern Division. (R. 112).

STATEMENT OF THE CASE

In this statutory proceeding under the Miller Act (U.S.C.A., title 40, sec. 270a, 270b; 49 Stat. 793, 794) the United States Court of Appeals for the Ninth Circuit held, for the first time, that the surety on the principal contractor's statutory payment bond is liable to a subcontractor, who fully completed performance of his subcontract, for damages for breach of the subcontract on the part of the principal contractor, in an amount practically double, and in addition to, the agreed price thereunder, the form of the recovery being on a quantum meruit theory for the alleged reasonable value of the services performed. In so holding, that court affirmed the judgment of the Federal District Court for the Eastern District of Washington.

There is conflict in the circuits on the question, and the same is one of tremendous importance to contractors, bonding companies, the Government, and the public. The decision should be reviewed and the question directly determined by this Court.

The action was brought by the United States for the use of M. C. Schaefer, doing business as Concrete Construction Company, the subcontractor, hereinafter referred to as respondent or Schaefer, against Sam Macri, Don Macri, and Joe Macri, doing business as Macri Company, the principal contractors, hereinafter referred to as Macri, and Goerig and Philp, Macri's silent partners and joint ven-

turers, and Continental Casualty Company, a corporation, Macri's surety, hereinafter referred to as petitioner or Continental, to recover for Macri's alleged breaches of the subcontract.

After a non-jury trial, the court rendered a lengthy oral decision, made findings, denied defendants' motions for judgment and for new trial, and entered judgment in favor of Schaefer in the sum of $56,764.97, together with interest at 6% from May 1, 1947, and costs in the sum of $921.70, against the Macris and Continental, that being substantially the full amount sued for. (R. 12, 94, 112, 115-117, 2208). Continental and Macri appealed to the court of appeals, (R. 118), which affirmed the judgment.

The evidence was in serious conflict, but we shall in this Court assume the correctness of Schaefer's evidence, as found by the trial court. So construed, the principal controlling facts may be briefly summarized as follows:

On December 7, 1943, Macri entered into a contract with the United States for a federal irrigation construction project, being a portion of the Roza Division, Yakima Project, near Yakima, Washington, for a total contract price of $128,550.95. (Pltf. Ex. 1; R. 96, 158, 172).

On the same date Macri as principal and Continental as surety executed a statutory "payment bond" to the United States as obligee in the sum of $64,275.48, pursuant

to the said Miller Act of August 24, 1935, conditioned as follows:

> "*Pursuant to the act of Congress* approved August 24, 1935. . . .
>
> "Now, therefore, *if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract,* and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue." (Pltf. Ex. 1; R. 96, 158, 172). (All italics herein are ours).

This bond was written pursuant to Macri's "application for bond" wherein the Macri partners agreed to indemnify Continental against any loss thereunder and agreed to pay its reasonable attorneys' fees, costs and expenses. (Casualty Co. Ex. 10; R. 98, 105, 158, 172, 236).

On December 11, 1943, Macri and Goerig and Philp entered into a written "joint adventure agreement" whereby they agreed to divide the profits, if any, derived from said government contract, and each of them agreed to pay the losses and liabilities, if any, incurred thereunder, and ratified said bond and application for bond. (Macri Ex. 7; R. 97, 98, 158, 176).

On March 14, 1944, Macri entered into a written subcontract with Schaefer, whereby Schaefer agreed to do all of the concrete work for the agreed price of $26.00 per

cubic yard of concrete installed. The job as a whole consisted of excavation work and thereafter the construction therein of numerous concrete structures for irrigation laterals, diversion boxes and sublaterals. The excavation work was to be done and the lumber for concrete forms furnished by Macri, the cement materials furnished by the Government, and the concrete work to be done by Schaefer. Paragraph 5 of the subcontract further provided:

> "If the work hereunder shall be delayed by any act, neglect or default of the Owner or of the Principal Contractor upon the entire work, . . . the Subcontractor shall give the Principal Contractor notice in writing within five days after the occurrence of any such act, omission or event, specifying the fact and cause of delay." (Pltf. Ex. 5; R. 99, 158, 175).

No such written notice was ever given by Schaefer. No notice of any kind, either written or oral, was ever given to Continental as to Macri's alleged breaches of contrace. (R. 175).

The total agreed contract price under said subcontract at the agreed rate of $26.00 per cubic yard of concrete installed, based upon government yardage figures, was $35,271.12. Prior to suit Macri paid Schaefer $32,614.66. It is so stipulated in the pre-trial order. (R. 78, 104). This leaves an unpaid balance of the contract price of only $2656.46. (R. 124, 2258). Continental does not dispute liability in said sum of $2656.46, but vigorously denies

liability for any larger amount. We shall hereinafter, for brevity, discuss the case as though said last mentioned sum had been paid.

Respondent's evidence, although disputed, showed and the trial court found that Macri breached the subcontract: (1) by making the excavations too slowly, and in an improper manner, too vertical, not wide enough nor at a proper / to / slope, (45° angle), so that Schaefer's carpenters were delayed and had to make additional excavations in order to install the lumber forms for the concrete; (2) in failing to do the fine grading in the proper manner and in time for Schaefer to proceed with prompt progress of the work; and (3) in failing promptly to furnish the proper quality and quantity of lumber when required for the concrete forms. From time to time Schaefer made oral complaints to Macri, and Macri promised to do better, but failed to do so. (R. 100-103).

Consequently, respondent's claim is actually composed of two parts:

(1) Compensation for doing a portion of what was not included in the concrete work to be done by respondent under the subcontract, such as excavation work and fine grading, which were to be performed by Macri; and

(2) For additional costs and expenses incurred by respondent in performing his own work under the sub-

contract by reason of delay thereof due to breach of contract by Macri in not having proper excavation or earth work and fine grading timely completed, form lumber of suitable quality available, etc. Respondent's work was rendered more difficult and expensive because delayed through the following severe winter.

Respondent has made no attempt to segregate the amount of his claim as between these two categories. He admits that he cannot do so. He admits that from day to day his men were spending a large part of their time doing the things which Macri should have done under the subcontract.

It is our contention that manifestly both of these claims or categories constitute damages for breach of contract on the part of Macri. Neither of them is work required or contemplated to be done by respondent under the subcontract. Both are outside of rather than within the subcontract.

The district court found and held that by reason of these facts "there was an implied agreement or quasi-contract" on the part of Macri and Continental to pay Schaefer the "reasonable value of his subcontract under the conditions and with the extra burdens imposed upon" him thereby. The district court found that the reasonable value of the services performed was $89,498.71, from which was deducted the agreed contract price paid in the sum of

$32,614.66, and entered judgment against Continental, as well as Macri, for the difference in the sum of $56,764.97, plus interest and costs, the same being substantially the full amount sued for. (R. 104, 113; Pltf. Ex. 63).

Respondent recognized that he was actually seeking recovery of *damages* for Macri's alleged breach of contract. In objecting to a certain document, his counsel said:

> "My point is, it is wholly immaterial to whether we're *entitled to damages against Macri* or he's entitled to damages against us." (R. 396).

Respondent conceded that he did not make or attempt to make any segregation whatever of the costs of performing the original subcontract and the additional cost of performance necessitated by Macri's breaches of contract or the cost of what respondent did which was not covered by his subcontract. (R. 406-7, 949-950, 953, 1298-9, 1368-1370, 2154-2156).

The reasonable value of respondent's services, if Macri had not breached the subcontract, would not have exceeded the agreed subcontract price. (R. 958, 960, 962, 1160-1163).

In computing the amount of recovery, the district court erroneously added to respondent's alleged costs and expenses, 20% for overhead expense, plus an additional 10% for profit. (Pltf. Ex. 63; R. 1241-2, 1252-1264).

Respondent admittedly did not elect to rescind the

subcontract, but continued and completed full performance thereof.

The court of appeals apparently based its decision on an alleged express oral contract of Macri to pay extra costs. On the other hand, the district court held that respondent could not recover on his first cause of action based on an alleged express oral contract of Macri to pay extra costs, but only on his alternative second cause of action based on *quantum meruit.*

The district court in his opinion stated:

"In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. . .

"*However, the court cannot find under the record here that there was a meeting of the minds, or an express contract* that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. *I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it*

over to him. He continued to complain. It's hard to conceive how he would have cause for complaint if he was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.* . . .

"*Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy,* United States vs. John A. Johnson and Sons, 65 F. Supp., page 527, *if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company.* However, it is my view that in these cases, although *there is involved the construction of the Federal statute, the Miller Act,* that nevertheless, so far as the substantive rights are concerned, that *the law of the state* is entitled to first consideration." (R. 2213-5).

"*I had some difficulty coming to a conclusion* as to whether general overhead should be included. I'm inclined to think that it should. . . .

"The item of profit is *another troublesome one.*" (R. 2222).

The district court stated that it is a close question, saying:

"As to Goerig and Philp's liability to Schaefer, and while it might seem at first blush that that is unimportant, I think that *it might very well be, because this is a close case, and these questions are close* and in some respects novel ones; and if *the appellate court should hold that the bonding company are not liable,* then I think the question of whether Goerig and Philp are bound would be important." (R. 2225).

"I know it is a close and difficult question." (R. 2229).

It is undisputed that Schaefer never assumed or agreed to any additional contractual obligations except the original subcontract. The court of appeals clearly erred in holding there was a subsequent new contract. As held by the district court, Schaefer repeatedly conceded that he expressly refused to agree thereto and continued to orally complain repeatedly as to Macri's breaches of the original subcontract. (R. 215, 218, 220, 223-6, 284-7, 328-9, 404-7, 457-462, 465, 560-1, 648-9, 655, 689-99, 720-1, 919-25, 1075-89, 1104-5, 2107, 2137-8, 2150, 2160-1, 2175, 2187-8, 2190).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision and judgment of the court of appeals here in question by writ of certiorari, pursuant to U. S. Code, title 28, sec. 1254, par. (1).

The decision of that court was filed on February 11, 1949, and our petition for rehearing was denied on April 5, 1949. (R. 2274-5).

Pursuant to U. S. Code, title 28, sec. 2101, par. (c) and (e), this petition is timely filed; and pursuant thereto the Chief Judge of that court on April 5, 1949 entered an order staying issuance of the mandate pending the filing of a petition for certiorari in this Court on or before May 16,

1949, and pending the final disposition thereof by this Court.

The jurisdiction of this Court is also invoked under par. 5 (b) of Rule 38 of this Court.

QUESTIONS PRESENTED

The principal questions presented herein are:

1. Where the principal contractor on a federal irrigation construction project breaches a subcontract, so that the subcontractor's performance thereof is thereby delayed and rendered more difficult and expensive, and the subcontractor therefore performs work not required of him or contemplated by the subcontract, and the subcontractor sustains damages by reason thereof, and the full agreed contract price has been paid to the subcontractor, and the same admittedly represents the full reasonable value of the services in performing said subcontract, is the surety on the principal contractors' statutory payment bond liable to the subcontractor for damages for such breach of contract in a suit brought on a *quantum meruit* theory to recover the alleged reasonable value of the services performed?

2. In such action based on the Miller Act, does the federal law rather than the state law govern as to the liability of the surety?

3. In such case is the surety liable for the subcontractor's alleged 20% overhead and 10% profit and other items in addition to the agreed contract price and the reasonable cost of labor and materials?

4. In such a situation may the subcontractor complete full performance of his written subcontract and then recover from the surety on the theory of *quantum meruit* or implied or quasi-contract, an amount far exceeding the agreed contract price?

5. Is the amount of recovery sufficiently supported by the evidence?

6. In an action involving a contract whereby the one party agrees to pay reasonable attorneys' fees of another party, his surety, may a federal appellate court allow in the same action such attorneys' fees for legal services on such appeal?

REASONS FOR ALLOWANCE OF WRIT

The following reasons are relied on by the petitioner for the allowance of the writ of certiorari herein, pursuant to par. 5 (b) of Rule 38 of this Court:

1. That the decision of the court of appeals is in conflict with the decisions of courts of appeals of other circuits on the same matter, including the following cases:

Friestedt Co. v. U. S. Fireproofing Co., (CCA 10) 125 F. 2d 1010; *U. S. v. Maryland Casualty Co.*, (CCA 5) 147 F.

2d 423, affirming *U. S. v. Maryland Casualty Co.*, 54 F. Supp. 290; *U. S. v. John A. Johnson & Sons*, 65 F. Supp. 514, 526-532; *U. S. v. Massachusetts Bonding & Ins. Co.*, (CCA 6) 18 F. 2d 203; *Wolfe v. Prairie Oil & Gas Co.*, (CCA 10) 83 F. 2d 434; *U. S. Potash Co. v. McNutt*, (CCA 10) 70 F. 2d 126; *Farnum v. Kennebec Water Dist.*, (CCA 1) 170 Fed. 173.

2. The court of appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

Each of the foregoing questions is a question of federal law and is of great public importance. Unless the decisions hereinafter cited are deemed controlling in our favor, none of these questions has heretofore been directly determined by this Court. Their importance in the proper future administration of the Miller Act definitely requires that they should now be authoritatively and directly determined and settled by this Court.

3. The court of appeals has decided important questions of federal law in a way probably in conflict with applicable decisions of this Court, including the following cases:

McEvoy v. U. S., 322 U. S. 102, 88 L. Ed. 1163; *U. S. v. Wyckoff Pipe & Creosoting Co.*, 271 U. S. 264, 70 L. Ed. 938; *Klebe v. U. S.*, 263 U. S. 188, 68 L. Ed. 244; *Dermott v. Jones*, 2 Wall. 1, 17 L. Ed. 762.

Continental also relies upon the reasons urged by Macri, its principal, in his petition for certiorari and supporting brief for review of the same judgment.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said court of appeals had in the case numbered and entitled on its docket, No. 11707, Continental Casualty Company, a corporation, appellant, v. United States for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, appellee, and Sam Macri, Don Macri and Joe Macri, and A. J. Goerig and Clyde Philp, appellants, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Court of Appeals affirming the judgment of the United States District Court for the Eastern District of Washington, Southern Division, be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Court may deem proper.

EUGENE D. IVY
ELWOOD HUTCHESON
GEORGE W. WILKINS
Attorneys for Petitioner,
Continental Casualty Co.

Supreme Court of the United States

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Defendants.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 173 F. 2d 5, and is set forth in full in the record. (R. 2264). It affirmed an unreported oral opinion of the federal district court. (R. 2208).

JURISDICTION

This Court has jurisdiction to review the decision and

judgment of the court of appeals here in question by writ of certiorari, pursuant to title 28, U. S. Code, sec. 1254, par. (1).

The decision of that court was filed on February 11, 1949, and our petition for rehearing was denied on April 5, 1949. (R. 2274-5).

Pursuant to title 28, U. S. Code, sec. 2101, par. (c) and (e), this petition is timely filed; and pursuant thereto the Chief Judge of that court on April 5, 1949 entered an order staying issuance of the mandate pending the filing of a petition for certiorari in this Court on or before May 16, 1949, and pending the final disposition thereof by this Court.

The jurisdiction of this Court is also invoked under par. 5 (b) of Rule 38 of this Court.

The jurisdiction of the federal district court herein is based upon the Miller Act, U.S.C.A., title 40, sec. 270a, 270b; 49 Stat. 793, 794. It is expressly so stated in Schaefer's amended complaint, and the district court so found. (R. 2, 10, 95, 97, 104).

Each of the questions, enumerated in the foregoing petition for certiorari, has been at all times directly raised by the petitioner in each of said courts.

We therefore submit that the nature of the case and of the rulings in the two courts below upon the foregoing

questions are such as to bring this case directly within the said statutory jurisdictional provisions, and directly within several clauses of par. 5 (b) of Rule 38 of this Court.

The following cases, among many others, are believed to sustain such jurisdiction of this Court:

Lane & Bowler Corp. v. Western Well Works, 261 U. S. 387, 67 L. Ed. 712; *Cuno Engineering Corp. v. Automatic Devices Corp.,* 314 U. S. 84, 86 L. Ed. 58; *Rodgers v. U. S.,* 332 U. S. 371, 92 L. Ed. 3; *Briggs v. Pennsylvania R. Co.,* 334 U. S. 304, 92 L. Ed. 1403; (the foregoing as to conflict with other circuits); *McEvoy v. U. S.,* 322 U. S. 102, 88 L. Ed. 1163; *Shapiro v. U. S.,* 335 U. S. 1, 92 L. Ed. 1787; *Hickman v. Taylor,* 329 U. S. 495, 91 L. Ed. 451; (importance of federal question and conflict with another district court decision); *Francis v. Southern Pac. Co.,* 333 U. S. 445, 92 L. Ed. 798; *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446, 459, 92 L. Ed. 1502, 1514; *U. S. v. Zazove,* 334 U. S. 602, 92 L. Ed. 1601; *Montana Mining Co. v. St. Louis Mining Co.,* 204 U. S. 204, 51 L. Ed. 444; *Brooklyn Savings Bank v. O'Neil,* 324 U. S. 697, 89 L. Ed. 1296; *Forsyth v. Hammond,* 166 U. S. 506, 41 L. Ed. 1095; *Muncie Gear Works v. Outboard Marine & Mfg. Co.,* 315 U. S. 759, 86 L. Ed. 1171.

STATEMENT OF THE CASE

This has already been stated in the preceding petition,

and the same is hereby adopted, incorporated by reference herein, and made a part of this brief

SPECIFICATION OF ERRORS

The district court and the court of appeals erred herein as follows:

1. In denying and affirming the denial of petitioner's motion for dismissal at close of plaintiff's evidence. (R. 951-2, 1376-7).

2. In denying and affirming the denial of petitioner's motion for dismissal at the close of all of the evidence. (R. 2206).

3. In making and affirming the making of finding of fact No. 15, and particularly in holding that there was any implied agreement or quasi-contract that respondent was to be paid the reasonable value of this work under the subcontract with the extra burdens imposed upon him by Macri's breaches thereof, for the reason that the same is contrary to law and is not a legal or proper basis of liability of the contractor's surety, and the same is contrary to the evidence. (R. 102-3).

4. In making and affirming the making of finding of fact No. 16, and particularly in finding that respondent performed services of the reasonable value therein stated and that there is a balance owing as therein stated, for

the reason that the same is contrary to the evidence and contrary to law as relating to petitioner. (R. 103-4).

5. In making and affirming the making of conclusion of law No. 1 that respondent should recover judgment against petitioner in the sum of $56,764.97 and costs or any other sum, for the reason that the surety is not legally liable for more than the agreed contract price. (R. 109-10).

6. In entering and affirming the entering of judgment in favor of respondent against petitioner in the sum of $56,764.97 and interest and costs, or any other sum. (R. 113).

7. In denying and affirming denial of petitioner's motion for new trial. (R. 115-7).

8. In refusing and affirming the refusal to dismiss the action as to petitioner.

9. In finding and holding that petitioner is liable as surety on the contractor's payment bond for the reasonable value of the work performed by respondent subcontractor in excess of the agreed contract price, for damages for breach of contract by the principal contractor in performing the subcontract, either upon a quantum meruit theory or otherwise, especially where, as in this case, it is undisputed that no segregation was made of the cost of performing the subcontract as written and as actually performed, in other words, no segregation of the items of the

subcontractor's expenses within and outside of said subcontract.

10. In rendering judgment and affirming judgment in favor of respondent and against petitioner for the reasons that the surety on contractor's payment bond, such as petitioner, is not legally liable for damages for breach of the subcontract, and there was no evidence presented segregating the items of the respondent's expenses within and without the said subcontract.

11. In concluding and holding that under the Miller Act the surety on the contractor's payment bond is legally liable for payment of compensation to a subcontractor on quantum meruit for reasonable value of work done necessitated by breach of subcontract by delaying the job, and improperly performing the same, and the court erred in rendering judgment and affirming judgment in favor of respondent against petitioner therefor. (R. 2264-2275).

12. In failing and refusing to hold that any amount recoverable by respondent from Macri in excess of $2656.46 was without the scope of the said subcontract and therefore not recoverable against petitioner.

13. In concluding and holding that the law of the State of Washington governed and that under said law respondent is entitled to such recovery against petitioner.

14. In concluding and holding that petitioner is liable,

among other things, for overhead expenses and alleged loss of profits of respondent. (R. 2222).

15. In concluding and holding that there was an express oral contract between Schaefer and Macri for the performance of additional work and the payment of additional compensation.

16. In concluding and holding that after full performance of the subcontract by Schaefer there was an implied agreement or quasi-contract between Macri and Schaefer for payment of the reasonable value of the work in excess of the agreed contract price.

17. In concluding and holding that the evidence sufficiently supports the amount of recovery herein.

18. In concluding and holding that petitioner cannot recover judgment herein on the contract (application for bond) for its reasonable attorneys' fees on appeal.

ARGUMENT

SUMMARY OF ARGUMENT

Our principal contentions herein may be briefly summarized as follows:

1. A surety on a federal construction project under the Miller Act is not liable for damages for breach of the subcontract by the principal contractor, either on the theory

of quantum meruit for the reasonable value of services performed due to such breach of contract or otherwise, and particularly where, as here, there is admittedly no evidence of segregation of the items of expense within and without the original subcontract. This is merely an indirect means of the subcontractor recovering damages for breach of the subcontract by the principal contractor, which legally may not be done against the surety.

The agreed contract price has been fully paid, with the exception of merely the retained percentage in the sum of $2656.46. Any amount recoverable by respondent from Macri in excess thereof was without the scope of the subcontract, and therefore not recoverable against petitioner.

2. The federal law governs, rather than the law of the State of Washington.

3. In any event the surety would not be liable for overhead expenses and alleged loss of profits of respondent, nor for any items except labor costs.

4. After respondent did not elect to abandon and rescind his subcontract, but continued and completed full performance thereof, he cannot recover from the surety on an implied or quasi-contract in excess of the agreed contract price.

5. There was insufficient proof of the amount of damages, especially in view of the absence of any evidence

segregating the cost of performing the subcontract as written and his expenses of performance outside of the subcontract.

6. In an action involving a contract whereby one party agrees to pay the reasonable attorneys' fees of another party, his surety, a federal appellate court upon request should in the same action allow such attorneys' fees for legal services on such appeal.

1. SURETY ON PAYMENT BOND UNDER THE MILLER ACT IS NOT LIABLE FOR DAMAGES OR INCREASED COSTS SUSTAINED BY SUBCONTRACTOR BY REASON OF BREACH OF CONTRACT BY PRINCIPAL CONTRACTOR.

The Miller Act, upon which this action is based, (U.S. C.A., title 40, sec. 270a and 270b) requires on every such contract:

> ". . . a payment bond with a surety or sureties, satisfactory to such officer *for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract* for the use of each such person."

Section 270b provides:

> "Every person who *has furnished labor or material in the prosecution of the work provided for in such contract,* in respect of which a payment bond is furnished under section 270a of this title and who has not been

paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him, for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of the institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him."

The pertinent language of the bond herein sued upon (Pltf. Ex. 1; R. 96, 158, 172) as follows:

"Pursuant to the Act of Congress approved August 24, 1935, . . . "Now, therefore, if the principal shall promptly make payment to all persons *supplying labor and material in the prosecution of the work provided for in said contract,* and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modification to the surety being hereby waived, then this obligation to be void; otherwise, to remain in full force and virtue."

The Act also requires a *performance bond* for the protection of *the Government.* Neither the statute nor the contract of the parties, however, required a *performance bond* for the protection of the *subcontractor.* No bond was ever written guaranteeing Macri's performance of the subcontract. The courts below clearly erred in holding that this statutory payment bond should be so construed as to have that effect. This is the first time that any court has ever so held. This necessarily would have a revolutionary and disastrous effect upon the surety business.

Respondent is seeking to enlarge the legitimate scope

of this statutory and contractual liability of petitioner. Manifestly this liability is restricted to claims for *"labor and material in the prosecution of the work provided for in said contract."* This language is repeated in both the statute and the bond. That is clearly the maximum extent of the surety's liability contemplated by Congress when it enacted this statute and contemplated by the parties when they signed this bond.

But here respondent is seeking to recover damages for breach of the subcontract on the part of Macri. True, he is seeking to do so by fallacious guise of seeking recovery of an alleged unpaid balance of the reasonable value of the work performed. However, with the relatively slight exception hereinabove stated (the retained percentage in the sum of $2656.46) respondent admittedly received from Macri prior to commencement of suit, full payment of the agreed contract price under the subcontract.

Respondent's own witnesses admitted that the said agreed contract price, namely $26.00 per cubic yard of concrete, represented the full reasonable value of the services to be performed by respondent under the subcontract. (R. 958, 960, 962, 1160-1163). Admittedly, all that increases respondent's claim is the alleged breach of contract by Macri: (1) This breach, according to respondent's evidence, rendered it necessary for the latter to do various things which were outside of the scope of respondent's

duties under his subcontract and which were things that were agreed to be performed by Macri. (2) Secondly, respondent's claim is increased because Macri's breaches delayed respondent and increased his operating expenses. There is no segregation of the amounts of these two claims.

Clearly neither of these claims constitutes a legal liability of the surety. Both of them manifestly constitute merely an indirect method of paying respondent damages for Macri's breaches of contract, and therefore not recoverable from the surety. *Neither of these claims is for "labor and material in the prosecution of the work provided for in said contract."* They are both outside of rather than within the scope of the subcontract. Both of them were far in excess of the reasonable value of the concrete work respondent agreed to perform under the subcontract.

Respondent and the courts below seek to place in the Miller Act a guarantee by the surety which Congress deliberately chose to omit. They seek to write into the bond a guarantee provision which is nowhere to be found within the four corners of that instrument. They seek to make a contract for the parties, and particularly for petitioner, which none of the parties, and certainly not petitioner, ever agreed to. Clearly this cannot lawfully be done.

Neither the Miller Act nor this bond states or even suggests that the surety undertakes the obligation of guaranteeing payment to subcontractors or others of damages

sustained by them by reason of breach of subcontract by the principal contractor. Consequently, to so extend the surety's liability would be wholly illegal and unjustifiable.

So long as laborers, materialmen and subcontractors are paid the full amount of their agreed contract prices for the work which they contracted to perform, the intent of Congress has been carried out, and the liability of the surety has been fully satisfied.

This case provides a ready object lesson of the undesirable procatical consequences if respondent's view were accepted. It will be noted that the courts below entered judgment in favor of a single claimant against the surety for $56,764.97, together with interest and costs, which is almost the full amount of the payment bond, namely, $64,-275.48. The Miller Act prescribes that the amount of the payment bond shall be one-half of the contract price. It will thus be seen that this left only a relatively small balance of $7510.51 to furnish protection to the large numbers of laborers and materialmen, as well as other subcontractors, if any. Such an interpretation would be most unfair to the other laborers and materialmen, and would certainly be wholly opposed to the intent of Congress in enacting this legislation for their benefit and protection.

Such an unwarranted expansion of the liability of sureties on such bonds would also mean a substantial increase in premiums, and a resulting increase in the amount

of contractors' bids and in the cost to the government of public construction projects.

Respondent concedes that he has made no attempt to segregate his costs of performing his subcontract as originally agreed to, and his *increased costs* of delayed performance of his subcontract *plus* a portion of *Macri's obligations* under the contract, by reason of Macri's breach thereof.

Respondent's claim is outside of, rather than within, the contract. It is not within, nor governed by, any obligation undertaken by respondent when he entered into this subcontract. It is admittedly almost three times the reasonable value of the work to be performed by Schaefer thereunder. It admittedly arises from work performed by his men which was entirely outside of the scope of his concrete work under his subcontract.

Likewise, as to the second phase or category of respondent's claim, namely, that his cost of performance was increased by Macri's delay and improper performance of his obligations under the subcontract—this also is clearly outside of the scope of the reasonable value of the work agreed to be performed by Schaefer thereunder. It follows that the claim is entirely outside of the scope of the surety's liability under the statutory payment bond.

Respondent's claim is directly predicated on Macri's

alleged breach of contract and not on respondent's furnishing of labor and material pursuant to contract.

A surety under the Miller Act is clearly not liable for damages for breach of contract by the principal contractor, either on *quantum meruit* theory or otherwise. Especially is this true where, as in this case, there is admittedly no segregation of the claimant's expense items within and outside of the contract.

Obviously compensation for any loss or increased cost sustained by respondent due to acts or omissions of Macri in breach of the contract is damages, no matter by what name it may be called. "A rose by any other name will smell as sweet."

Respondent concedes that he was not required to pour a single yard of concrete in addition to that originally contracted for. The scope of his contract was never increased. The additional costs sued for are merely claims for items of damage caused by Macri's breach. The surety should certainly not be penalized and subjected to an action for damages merely because it is labeled quantum meruit—and especially so when it is admitted that the claim arises entirely by reason of the fact that respondent was damaged, as he contends, by Macri's breach. Admittedly there was nothing unusual about the performance of the work by Schaefer except that he complains of Macri's acts and omissions which resulted in increasing his costs.

Respondent must concede that all his costs over and above his contract price were directly caused by and attributable to Macri's breach. How, then, can he reasonably deny that what he is actually seeking here is to recover from the surety damages for Macri's breach of contract? This is an obligation never assumed in the surety's contract and never imposed upon it by Congress.

Respondent's claim is based upon damages for Macri's breach and damages which are entirely outside of the scope of the contract. So long as respondent has admittedly received full payment (with said slight exception) of the full agreed contract price under the subcontract, and which also admittedly represented the full reasonable value of the work which respondent was obligated to perform under the subcontract, there cannot possibly be any further liability of the surety to respondent.

Obviously the surety is not a party to the subcontract between Macri and Schaefer; and by its payment bond petitioner did not guarantee performance of the contract on the part of either and did not assume liability to either for damages for breach thereof.

The only obligation assumed by the surety under this bond was to guarantee payment of the agreed contract price for labor and materials furnished in the prosecution of the work under the contract. The surety did not guarantee payment for labor and materials furnished because

the prime contractor breached his contract by delaying the job or failing in some other way to do things required of him under the subcontract.

Respondent's whole claim is predicated upon the fact that due to Macri's fault respondent was required to do work that was not required of him under his subcontract, and which it would not have been necessary for him to ~~do~~ except for Macri's failure to perform his part of the subcontract. Obviously, however, a claim to be compensated for this additional expense or for damages based thereon, is not a claim for "labor and materials in the prosecution of the work provided for in the contract," but rather is a claim for damages for compensation for work which was rendered necessary for him to do because of Macri's failure to do so properly as required by the subcontract. Admittedly, if Macri had performed his obligations under the contracts, none of this additional labor and expense would have been required. *Since it never was required in the performance of Schaefer's obligations under the subcontract, it does not constitute a valid claim against the surety.*

Respondent's contention is especially unfair to the surety in view of the admitted fact that the latter never had notice of Macri's alleged breach until after the job was fully completed. If its liability were so extended, it had no fair opportunity to protect itself.

The decisions of the courts below completely ignore

the subcontract between the parties. It was never rescinded, but at all times remained in full effect. Although Schaefer orally made numerous complaints, he continued and fully performed his subcontract. As to all work covered thereby, he cannot now lawfully recover in excess of the agreed contract price. As to work *not* covered thereby, he cannot recover from the surety at all.

If this erroneous decision were to stand, a surety would be powerless to protect itself. By executing such a payment bond, it would be in effect guaranteeing payment of all damages for breaches of subcontracts by the principal contractor, in addition to the cost of labor and materials, and also would be guaranteeing payment of whatever might be found to be the reasonable value in such event of performance of subcontracts. Certainly that is not and should not be the law.

The decisions of the two courts below are upon entirely different and inconsistent grounds. The district court's decision was on the erroneous ground that *the state rather than federal law* governed, and an *implied or quasi-contract* arose. The decision of the court of appeals held that of course federal rather than state law governed, but was on the erroneous ground that there was a subsequent oral *express contract* to pay additional compensation for these services. The evidence is clear, however, as held by the district court, that *Schaefer refused to make any*

contract to perform additional services. He continued to complain orally because Macri did not properly perform the same.

The decision herein is directly contrary to decisions on this question by the courts of appeals in the tenth and fifth circuits, and the federal district courts of Maryland and Montana, in the following cases:

Friestedt Co. v. U. S. Fireproofing Co., (CCA 10) 125 F. 2d 1010; *U. S. v. Maryland Casualty Co.,* (CCA 5) 147 F. 2d 423, affirming *U. S. v. Maryland Casualty Co.,* 54 F. Supp. 290; *U. S. v. John A. Johnson & Sons,* 65 F. Supp. 514, 526-532; *U. S. v. Seaboard Surety Co.,* 26 F. Supp. 681; *U. S. v. Massachusetts Bonding & Ins. Co.,* (CCA 6) 18 F. 2d 203; *American Surety Co. v. Wheeling,* (CCA 4) 114 F. 2d 237. These decisions are directly in point and cannot be distinguished. The first three are quoted in the appendix hereto.

The district court herein recognized that his decision was diametrically opposed to the Johnson case, supra, and that that case, if followed, would preclude recovery against Continental, and that it should be followed if federal law governs. (R. 2215).

While not directly in point, the decision is also contrary in principle to the recent decision of this Court in *McEvoy v. U. S.,* 322 U. S. 102, 88 L. Ed. 1163, wherein this Court

held the surety not liable in a similar situation, after it "granted certiorari because of a novel and important question presented under the Miller Act." The same should be done in this case. The McEvoy case is likewise quoted in the appendix hereto.

2. IN ANY EVENT SURETY NOT LIABLE FOR ANY ITEMS EXCEPT LABOR EXPENSES.

In any event the courts below clearly erred in allowing recovery for any items other than labor and materials actually going into the finished job. For example, the courts allowed recovery of an additional 20% of the total amount of respondent's claim, namely $13,542.57, for "overhead expense," and allowed an additional 10% of the total, or $8,125.42, for respondent's "profit."

Such overhead expense and profit items are not for "labor and materials," and are not recoverable against the surety. Here also there is a conflict in the circuits.

U. S. v. Davidson, 71 F. Supp. 401; *U. S. v. Great American Indemnity Co.,* 30 F. Supp. 613; *U. S. v. Standard Casualty Co.,* 32 F. Supp. 836; *U. S. v. Rego Building Corp.,* (CCA 2) 87 F. 2d 1021; *Continental Co. v. Boyd,* (CCA 10) 140 F. 2d 115; *Theobold-Jansen Electric Co. v. Meyer,* (CCA 10) 77 F. 2d 27.

Exhibit 63 contains respondent's itemized computation

of his claim for damages. The first item, which is the largest, covers alleged labor expense. The remainder are clearly, in any event, not allowable. Such items as insurance, taxes, purchase price and repairs of equipment, lumber and roofing for cement shed, travel, miscellaneous, bond premium, overhead expense, and profit, clearly do not come within the statutory terms "labor and material in the prosecution of the work provided for in said contract," and hence are not recoverable from petitioner.

3. THE ACTION BEING BASED UPON A FEDERAL STATUTE, THE MILLER ACT, THE FEDERAL RATHER THAN STATE LAW GOVERNS.

The decision of the trial court was based upon the clearly erroneous ground that the state law rather than federal law governs. (R. 2215). Of course, obviously, as held by the court of appeals herein, (R. 2267) this was clearly erroneous. The action is based upon a federal statute, the Miller Act, and manifestly the question of the liability of the surety thereunder is governed by federal rather than state law.

Clearfield Trust Co. v. U. S., 318 U. S. 363, 87 L. Ed. 838, affirming *U. S. v. Clearfield Trust Co.*, (CCA 3) 130 F. 2d 93; *Royal Indemnity Co. v. U. S.*, 313 U. S. 289, 85 L. Ed. 1361; *D'Oench v. Federal Deposit Ins. Corp.*, 314 U. S. 447, 86 L. Ed. 956; *Sola Electric Co. v. Jefferson Elec-*

tric Co., 317 U. S. 173, 87 L. Ed. 165; *Commissioner v. Tower*, 327 U. S. 280, 287, 90 L. Ed. 670, 676; *Francis v. Southern Pac. Co.*, 333 U. S. 445, 92 L. Ed. 798; *Liebman v. U. S.*, (CCA 9) 153 F. 2d 350; *U. S. v. Conti*, (CCA 1) 119 F. 2d 652; *U. S. v. Starr*, (CCA 4) 20 F. 2d 803; *Farnsworth v. Electrical Supply Co.*, (CCA 5) 112 F. 2d 150.

Moreover even under the state law of Washington the surety is not liable in excess of the contract price.

Lidral-Wiley, Inc. v. U. S. Fidelity & Guaranty Co., 179 Wash. 631, 38 P. 2d 346; *Terry v. U. S. Fidelity & Guaranty Co.*, 196 Wash. 206, 82 P. 2d 532, 119 A.L.R. 1276; *Hamilton v. Whittaker*, 29 Wn. 2d 173, 186 P. 2d 609; *Black Masonry & Contracting Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517.

4. RESPONDENT HAVING CONTINUED AND COMPLETED FULL PERFORMANCE OF HIS SUBCONTRACT CANNOT RECOVER ON IMPLIED OR QUASI-CONTRACT IN EXCESS OF THE AGREED CONTRACT PRICE.

Moreover this judgment clearly violates fundamental principles of the law of contracts and is in conflict with numerous decisions of this Court and courts of appeals in other circuits.

It is undisputed that there was here no prevention of

performance, and that Schaefer did not elect to abandon the contract by reason of Macri's alleged breach thereof. On the contrary Schaefer continued and completed full performance of the subcontract. It is well settled that under such circumstances the breach will be deemed a partial rather than total breach; and his sole remedy is an action against Macri to recover damages for the breach of contract. He cannot recover,, especially against the surety, on an implied or quasi-contract an amount in excess of the agreed contract price.

It is fundamental that where there is an express contract, the law will not create an implied or quasi-contract.

Klebe v. U. S., 263 U. S. 188, 68 L. Ed. 244; *Hawkins v. U. S.*, 96 U. S. (6 Otto) 689, 24 L. Ed. 607; *Hubbard v. New York Inv. Co.*, 119 U. S. 696, 30 L. Ed. 548; *Wolfe v. Prairie Oil & Gas Co.*, (CCA 10) 83 F. 2d 434, 438; *Ogden v. Ruhm*, (CCA 2) 7 F. 2d 1007, 1009, cert. denied, 269 U. S. 571, 70 L. Ed. 417; *U. S. Potash Co. v. McNutt*, (CCA 10) 70 F. 2d 126; *17 C. J. S. 321*, sec. 5, and 325, sec. 6; *Quigg Construction Co. v. Chelan*, 108 Wash. 314, 184 Pac. 331.

The judgment herein is directly contrary to *U. S. v. Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263, 70 L. Ed. 938, where the contractor was wrongfully delayed, and this Court held that his sole remedy was an action against the contractee for damages for breach of contract, but he could *not* recover the reasonable value of the work done. The

case is directly in point and controlling here. See the quotation therefrom in the appendix hereto.

This decision is directly contrary to *City & County of San Francisco v. Transbay Const. Co.*, (CCA 9) 134 F. 2d 468, cert. denied, 320 U. S. 749, 88 L. Ed. 445, where the court said:

> "The judgment appears unsupported by reason or authority. . . *But having proceeded with the contract, Transbay was not thereafter at liberty to treat it as nonexistent and recover for the entire job on a cost plus basis.* There is no reason whatever for supposing that it was entitled to relief of that kind, since the legitimate losses it sustained were adequately compensable in damages. . . .
>
> "The argument has little but its fervor to recommend it. . . .
>
> "These decisions . . . lend no color to the notion that the entire contract is for all purposes to be treated as out of the window."

This decision erroneously permitting Schaefer to rescind the express contract, after he elected to continue thereunder, and to recover on quantum meruit, after he had fully performed the same, is directly contrary to well settled principles.

Williston on Contracts (Rev. Ed.) vol. 5, p. 3676, sec. 1290; Restatement of Contracts, sec. 317 (2) and sec. 350, and Comments a and b, and Illustration 1 thereto; *Hennessy v. Bacon*, 137 U. S. 78, 34 L. Ed. 605; *Quigg Construction*

Co. v. Chelan County, 108 Wash. 314, 184 Pac. 331; *12 Am. Jur. 968,* sec. 390.

This decision in allowing recovery in excess of the agreed contract price is also directly contrary to the following decisions in other circuits:

Farnum v. Kennebec Water Dist., (CCA 1) 170 Fed. 173; *U. S. Potash Co. v. McNutt,* (CCA 10) 70 F. 2d 126; *Wolfe v. Prairie Oil & Gas Co.,* (CCA 10) 83 F. 2d 434; and the decision of this Court in *Dermott v. Jones,* 2 Wall. 1, 17 L. Ed. 762.

On this question the decision violates the state law of Washington, which is well settled that in a suit on quantum meruit the contract price is the maximum limit of recovery. *Noyes v. Pugin,* 2 Wash. 653, 27 Pac. 548; *Bailey v. Furleigh,* 121 Wash. 207, 208 Pac. 1091; *Davis v. Thurston County,* 119 Wash. 414, 205 Pac. 840; *Dyer v. Pederson,* 112 Wash. 390, 192 Pac. 1002 (197 Pac. 622); *Chase v. Smith,* 35 Wash. 631, 77 Pac. 1069; *Rachow v. Philbrick,* 148 Wash. 214, 268 Pac. 876; *Quigg Construction Co. v. Chelan County,* 108 Wash. 314, 184 Pac. 331.

Among numerous other authorities to the same effect are:

Hoyle v. Stellwagen, 28 Ind. App. 681, 63 N. E. 780; *Keyhoe v. Rutherford,* 56 N. J. L. 23, 27 Atl. 912; *Oakley v. Duluth Superior Dredging Co.,* 223 Mich. 478, 194 N. W. 123;

Dickerson v. Emmerson, 154 Ore. 558, 68 P. 2d 439; *Keeler v. Clifford,* 165 Ill. 544, 46 N. E. 248; *Edward Thompson Co. v. Decker,* 200 Ill. App. 179, 181; *Little v. Brown,* 36 Ariz. 194, 283 Pac. 924; *Wilson v. Reynolds,* 213 Ind. 436, 13 N. E. 2d 218, 222; 7 *C. J. S. 136,* sec. 36.

The provision of paragraph 5 of the subcontract for an extension of time in case of delay, *after written notice* by the subcontractor, furnishes his exclusive remedy.

Wells Bros. Co. v. U. S., 254 U. S. 83, 65 L. Ed. 148; *Goss v. Northern Pac. Hospital Assn.,* 50 Wash. 236, 96 Pac. 1078; *Hansen v. Covell,* 218 Cal. 622, 24 P. 2d 772, 89 A.L.R. 670; *Haydenville Mining Co. v. Art Institute,* 39 Fed. 484; *Richard v. Clark,* 88 N.Y.S. 242; *Russell v. Bothwell,* 57 Utah 362, 194 Pac. 1109.

5. INSUFFICIENT PROOF OF DAMAGES.

As hereinabove stated, there was admittedly no evidence segregating the costs of performing the subcontract as written and the cost of additional work performed. There was no segregation of respondent's expenses within and outside of the subcontract. He admitted he was unable to do so.

Under these facts respondent's evidence as to amount of damages was legally insufficient and too uncertain to justify any recovery.

Keogh v. Chicago & N. R. Co., 260 U. S. 156, 164, 67 L. Ed. 183, 188; *Jack v. Armour & Co.*, (CCA 8) 291 Fed. 741, 745; *Locker v. Am. Tobacco Co.*, (CCA 2) 218 Fed. 447, 450; *Automatic Canteen Co. of Washington v. Automatic Canteen Co. of America*, 182 Wash. 133, 45 P. 2d 41; *Quigg Construction Co. v. Chelan County*, 108 Wash. 314, 184 Pac. 331.

6. ADDITIONAL ATTORNEYS' FEES.

The Macris and their silent partners, Goerig and Philp, are liable to Continental on the application for the bond (Casualty Co. Ex. 10) for additional attorneys' fees on the appeal to the court of appeals and in this Court. In disallowing the same, the decision of the court of appeals is directly contrary to the well settled rule in other circuits.

American Can Co. v. Ladoga Canning Co., (CCA 7) 44 F. 2d 763, 772, cert. denied, 282 U. S. 899; *Rigopoulous v. Kervan*, (CCA 2) 140 F. 2d 506, 508; *Louisville & N. R. Co. v. Dickerson*, (CCA 6) 191 Fed. 705, 712; *Davis v. Parrington*, (CCA) 281 Fed. 10, 17.

CONCLUSION

We therefore respectfully submit that the decision below is clearly erroneous, and the same is of such nature that it should be reviewed and reversed in the proper exercise of the supervisory powers of this Court. The same

is contrary to numerous decisions of this Court, contrary to numerous decisions of the courts of appeal in other circuits, and contrary to well settled fundamental legal principles.

These are federal questions of substance and of great public importance. This Court has never heretofore directly determined this question as to the liability of a Miller Act surety under these circumstances. The law should now be definitely, properly, and authoritatively defined by this Court herein. The issue is now directly presented to this Court, and its proper adjudication now will prevent similar future errors.

If this decision were to stand, it would be revolutionary and disastrous to the surety business of writing bonds for federal projects. In executing a Miller Act bond, under this decision, a surety would be subjecting itself to virtually unlimited liability as a guarantor to all subcontractors of strict performance of subcontracts by the principal contractor. If sureties are, contrary to the obvious intent of Congress, to be subjected to such unlimited liability, with no reasonable practicable opportunity of protecting themselves, manifestly the costs to the public of federal projects will necessarily be substantially increased.

We therefore respectfully submit that this case is one calling for the exercise by this Court of its supervisory

powers, that the writ of certiorari should be granted, and thereafter the decision should be reviewed and reversed, and the action should be ordered dismissed as to petitioner.

Respectfully submitted,

EUGENE D. IVY
ELWOOD HUTCHESON
GEORGE W. WILKINS
Attorneys for Petitioner,
Continental Casualty Co.

APPENDIX

1. (Point 1)

In *Friestedt Co. v. U. S. Fireproofing Co.*, (CCA 10) 125 F. 2d 1010, the court said:

"*Stripped of all technicality,* plaintiff and intervenor *seek to recover damages claimed to have been incurred because of the breach of the contractor of an implied covenant in the subcontract against unreasonable delays in preventing the subcontractors from proceeding with their work.* The parties recognize this, because in the only point relied upon in their designation of points, it is asserted that: '. . . a subcotractor can recover his damages consisting of expenses made necessary by the delay of the principal contractor in a proceeding to recover on the bond under the Heard Act, 40 U. S. Code, Sec. 270.' They cite numerous authorities to sustain their position that every contract contains an implied warranty against unnecessary delays and that recovery may be had for loss resulting from a breach thereof. *These decisions are beside the point, because they arose in actions against the contractor for damages and not against the surety on a Heard Act bond.* . . .

"Here the contract required plaintiff and intervenor to furnish labor and material and perfect certain constructions. They performed their part of the agreement and received their agreed compensation provided for in the contract. There is here no claim that they furnished any extras necessary for the completion of the contract and therefore contemplated by the parties and implied in the contract. *The claim for which the parties seek recovery here did not arise under the contract, but outside of the contract. What was done was not required by any of the terms of the contract, but became necessary because of an alleged breach of the contract because a contractor violated one of the*

terms of the contract; in other words, committed a wrong against the parties resulting in loss or damage to them.

"*We know of no case that has gone so far as to hold that one may recover damages for breach of contract on a bond required under the Heard Act. The only case deciding this precise question has held to the contrary.* See *United States v. Seaboard Surety Co.*, D. C. Mont., 26 F. Supp. 681. *We fail to discern anything in the Heard Act evidencing a Congressional intent to protect one under the bond required by the Act against damages resulting from breach of contract. Had such been the Congressional intent, it no doubt would have been evidenced by appropriate language.*" (All italics are ours).

In *U. S. v. Maryland Casualty Co.*, 54 F. Supp. 290, the court said:

"We are unable to distinguish in principle the present from the Friestedt case. *While the plaintiff calls its demand one for the rental or the use value of its equipment, it is in reality for the damage caused* by keeping the equipment idle in compliance with the orders of the Government engineer—in other words, for a breach of the implied obligation that it would be permitted to perform without interference. It is not a claim for money paid to others for the rental of the machinery, as was true in some of the cases cited, but for *what it lost*, because of its inability to use or remove the equipment. . . .

"The conclusion is that the nature of the demand is such that it does not disclose a right to recover against the surety for labor and materials furnished under the statute and bond given pursuant thereto."

The foregoing decision was affirmed in *U. S. v. Mary-*

land Casualty Co., (CCA 5) 147 F. 2d 423, where the court said:

> "Upon answer and amended answer of Bond Company the issue finally, and according to appellant, was amplified to: 'Whether or not a surety on a bond given under 40 U.S.C.A. § 270a is liable for the use value of or rent on equipment furnished in the prosecution of public work, while such equipment is kept idle on the job by the government engineer in charge of the work, but for no reason contemplated by the contract. Stated differently, is or not the use value or rent on equipment, under the circumstances stated, "material" within the meaning of and covered by such statute and bond? . . .
>
> "While the question here is not without its difficulties, the great weight of authority leads to the conclusion that while such a bond with its enabling enactment, which we have here under consideration, must be liberally construed, we are not warranted in writing, liability into the contract and the statute. Nothing was owing for work, labor or equipment, and nothing was owing for material in the prosecution of the work; no modifications of the contract had been made or were contemplated. All that transpired was that, without fault of the subcontractor, the Government engineer ordered the work stopped and declined to permit the removal of equipment. *This was a breach of contract, and it may be that appellant is entitled to recover for this breach as against the prime contractor or the Government or both, but it becomes patent that we are not warranted in fastening upon the Casualty Company liability on its bond for this breach.* (Citing cases).
>
> "The appellant has cited many cases which we have carefully considered. *In every instance, however, where recovery was allowed on the bond, the outlay*

for which recovery was sought was necessary for the performance of the contract and was within the contemplation of the parties to the contract. It is without dispute that the injury alleged to have been suffered here by the appellant was not contemplated by the parties, but was totally unexpected and unforeseen.

"We are of opinion and so hold that Maryland Casualty Company should be and is absolved from liability on its bond."

In *U. S. v. John A. Johnson & Sons,* 65 F. Supp. 514, 526-532, Judge Coleman of Maryland, in a decision directly in point, said:

"The substance of the second counterclaim is that the general contractor, although having expressly agreed to provide temporary construction of every nature, necessary to the completion of the work on the project by the subcontractor within the specified time, including the providing of access to the construction site, the general contractor nevertheless failed to provide such access and that, as a result, the progress of the work by the subcontractor was materially interfered with and delayed, *thus greatly increasing the cost to the subcontractor,* whereby he was damaged in the sum of $13,740.01. . . .

"Coming, then, to the motion to dismiss the other counterclaim of the subcontractor Friedman, the basic question here is whether under the Miller Act a subcontractor may recover damages against a general contractor and his surety on a *claim which is directly predicated on a breach of contract by the general contractor and not on the furnishing of labor and material by a subcontractor pursuant to contract.*

"That this is a suit by the subcontractor for such breach of contract by the general contractor seems clear. . . .

"To repeat, we think a distinction must be made between doing work which is of an extra or additional character, or reasonably implied by the terms of the contract as *part of the obligation of the scbcontractor,* and work which, *as in the present case, not he but the main contractor alone is, by the very terms of the agreement, required to do. The distinction is, in a sense, narrow and technical, but it goes to the very essence of the restricted rights given by this special statute, the Miller Act.* We are not unaware of the fact that there are numerous decisions to the effect that a liberal construction must be given to the Miller Act and its predecessor, the Heard Act. . . *But the liberality of construction referred to in those decisions is not meant to go so far as to extend the scope of the Act and to embrace a claim for damages such as the present one. . .*

"Finally, it may reasonably be argued from the dearth of authorities on this precise question, that, *in line with the Friedstedt case, it has been generally conceded that this type of claim was not cognizable* under either the Heard Act or the Miller Act. But however that may be, *both the weight of such authority as exists, and logical interpretation of the statute, require the conclusion here reached.*"

The foregoing portion of the Johnson decision was so clearly right that Friedman, the subcontractor, did not even appeal therefrom. An appeal was taken from a different portion of that decision, and the same was affirmed in *John A. Johnson & Sons v. U. S.,* (CCA 4) 153 F. 2d 534, cert. denied, 328 U. S. 865. The latter decision was the only case cited by the court of appeals herein. The distinction between the two, however, was clearly pointed out by Judge Coleman:

"We are not unmindful of the fact that, in another part of this same proceeding we have allowed this same subcontractor to recover from the general contractor on a counterclaim for extra material and labor he had furnished, on the ground that there was an improper rejection by the general contractor of the material originally supplied. That is to say, we held that the subcontractor was entitled to be paid what this improper rejection had cost him, due to replacing the material with material of higher grade.

"Such counterclaim, it is true, was based upon breach of contract in the sense that the general contractor had not lived up to his part of the agreement in so far as a duty to inspect the material, originally supplied, was imposed upon him in the first instance. However, by the express terms of the last paragraph of Article IV of the subcontract, which we have previously quoted, the subcontractor and not the general contractor was required to replace the material when ordered so to do by the general contractor, without prejudice to the right given him by the subcontract to have a later determination as to whether or not he should have reimbursement, for any additional expenditures as a result of such replacement. So, it will be seen that the performance by the subcontractor, upon which he based his right to recovery, was *performance such as was expressly required of him by the contract for which, and only for which, he could recover under the payment bond* which we have heretofore analyzed; whereas, *in the present case, there is the distinction that the subcontractor has not supplied labor and materials which he was, in fact, ever required to supply bp the terms of the contract.* Thus, *the subcontractor's present counterclaim is for damages as such, resulting from the general contractor's alleged breach of the contract, although it is true the alleged damages are measured by the cost of labor and materials to the subcontractor which the general contractor, if any one, should*

have supplied but did not. The distinction is more than a mere technical one. It is a legal distinction required by the very terms of the documents by which the subcontractor is restricted in this limited, statutory proceeding. . . .

"The distinction between the two questions is real, not fanciful."

In *McEvoy v. U. S.*, 322 U. S. 102, 88 L. Ed. 1163, this Court said:

"We granted certiorari because of a novel and important question presented under the Miller Act. . . . 320 U. S. 733, ante 433, 64 S. Ct. 267. . . .

"Specifically the issue is whether under the Miller Act a person supplying materials to a materialman of a Government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor. We hold that he cannot. . . .

"To allow those in more remote relationships to recover on the bond would be contrary to the clear language of the proviso and to the expressed will of the framers of the Act. . . .

"To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety. To sanction such a risk requires clear language in the statute and in the bond so as to leave no alternative. Here the proviso of § 2 (a) of *the Act forbids the imposition of such a risk,* thereby foreclosing Tompkins' right to sue on the payment bond."

2. (Point 4)

In *U. S. v. Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263, 70 L. Ed. 938, this Court said:

"The government contends that recovery cannot be had on the contract for the higher market value of the work at the time it was actually performed; that the correct measure of damages for its delay is the loss actually sustained by the contractor as the result of the delay (citing cases); that the increase in the market value of materials purchased for use on the contract cannot be deemed a loss; and that to assess damages on the basis of the value of the work at the time it was performed was, in effect, to make a new contract for the parties or to allow recovery as upon quantum meruit. The contention is, in our opiniion, well founded.

"The contractor urges that the long delay was a breach which would have justified it in terminating the contract and refusing to do the work except under a new one at an increased price. But, despite a contention to the contrary, it did not do this. It completed the work under the contract as originally made. It did not attempt to make a new contract, or to modify the existing one. It sought merely to reserve its right to make a claim for the damages resulting from the government's delay. . . .

"The contractor elected to hold itself in readiness to perform its contract and to this end to retain both the lumber and the creosote oil. The carrying charges thus incurred are an allowable item of damage; but these were not shown. . . .

"But clearly it cannot now charge as a loss profits which it might have made if it had sold the supplies in the market or used them on another job. . . .

"But, in the case at bar, the court did not pursue that course. It made no estimate of the loss suffered. It found merely *the increase in value of the work at the time it was performed* and the increase in value of the material during the period of delay. Then *it found and concluded,* as a matter of law, that *the excess of the reasonable value of the work at the time it was done over the amount paid therefor, was recoverable as damages. This was error.*"